...PREME COURT

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1260

LOUIS POMPONIO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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OCTOBER TERM, 1974

No.

LOUIS POMPONIO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Louis J. Pomponio, Jr.,[1] respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 7, 1975.

OPINIONS BELOW

The Opinion of the Court below is not yet reported. It is set out in Appendix I, pp. 1a-7a, *infra*. The Court's Judgment is set out in Appendix II, p. 8a, *infra;* and its Order denying the Petition for Rehearing and Sug-

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[1] In the District Court, the case was styled with Petitioner's correct name, Louis J. Pomponio, Jr. Inexplicably, in the Court below the name of Petitioner, and thus the caption, was changed to Louis Pomponio.

gestion for Rehearing En Banc, in Appendix III, p. 8a, *infra*. The opinion of the District Court granting the arrest of judgment was rendered orally and is not reported; the report thereof is set out in Appendix IV, pp. 9a-10a, *infra*.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was entered on February 7, 1975. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 4, 1975, and this Petition for a Writ of Certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May the term "bribery" as used in the Travel Act, 18 U.S.C. § 1952, be expanded to include "commercial bribery" and thus reach out to payments made to private persons, as the Court below held, or is it confined to payments made to public officials only, as other Federal Courts have held and as this Court stated in *United States* v. *Nardello,* 393 U.S. 286 (1969)?

2. May the Travel Act, 18 U.S.C. § 1952, be used to extend 18 U.S.C. § 215 to those persons *making* payments to bank officials when that statute by its terms is expressly limited to bank officials who *receive* such payments?

STATUTORY PROVISIONS INVOLVED

The Travel Act, 75 Stat. 498, 18 U.S.C. § 1952, as amended, provides as follows:

§ 1952. Interstate and foreign travel or transportation aid in racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations or violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

* * * * *

Pertinent portions of the New York Penal Law provide as follows:

§ 180.00 Commercial bribing

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to in-

fluence his conduct in relation to his employer's or principal's affairs.

Commercial bribing is a class B misdemeanor.

* * *

§ 200.00 Bribery

A person is guilty of bribery when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

Bribery is a class D felony.

* * *

§ 70.15 Sentences of imprisonment for misdemeanors and violation

* * *

2. Class B misdemeanor. A sentence of imprisonment for a class B misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed three months.

* * *

§ 70.00 Indeterminate sentence of imprisonment for felony

* * *

2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:

* * *

(d) For a class D felony, the term shall be fixed by the court, and shall not exceed seven years. . . .

* * * * *

18 U.S.C., § 215, 62 Stat. 695, as amended, provides as follows:

§ 215. Receipt of commissions or gifts for procuring loans

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

STATEMENT OF THE CASE

The Indictment in this case, found deficient by the District Court and adequate by the Court of Appeals, was returned by a Grand Jury in the United States District Court for the Eastern District of Virginia on September 24, 1973. It accused Petitioner, together with his brothers Peter and Paul Pomponio and their attorney, Charles J. Piluso, of violating and conspiring to violate the Travel Act, 18 U.S.C. § 1952. Describing the Pomponio brothers as builders, owners and operators of high-rise buildings in Northern Virginia and the District of Columbia, the Indictment contains not the slightest suggestion that they were engaged in anything other than a legitimate business; there are no allegations or even intimations that there are organized crime overtones in this case. The Indictment describes Sidney M. Zneimer as a Vice President of the Royal Na-

tional Bank of New York who had responsibility for reviewing Pomponio requests for construction loans, for arranging the participation of other lending organizations in such loans and, in general, administering those construction loans after they were made. While the Indictment which was issued contained nine counts, the Government proceeded to trial only on the conspiracy count and two substantive counts. In essence, the Indictment charged that commencing on or about September 1, 1967 the Petitioner, his two brothers and his attorney conspired with each other and with Zneimer (who was named as an unindicted co-conspirator) to violate the Travel Act, in order to carry on the unlawful activity of "commercial bribery", in violation of New York Penal Law § 180, set out at pages 3-4, *supra*, and also 18 U.S.C. § 215, set out at pages 4-5, *supra*—by giving Zneimer various sums of money and things of value.[2]

On the ground that the plain language of the statute as well as legal authority and legislative intention demonstrated that "*commercial* bribery" was *not* encompassed within the term "bribery" as it appeared in the Travel Act, Defendants filed a pretrial Motion to Dismiss the Indictment for Failing to State Crimes. District Judge Oren R. Lewis never formally ruled on this Motion, but denied it as a practical matter by scheduling the trial to commence on March 25, 1974. The case proceeded at that time as to the other Defendants; Petitioner was severed because of illness. That trial re-

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[2] Count I, the conspiracy Count, refers to the unlawful activity as "commercial bribery", whereas Counts V and IX, the substantive Counts, as "bribery." App. V, which sets out the pertinent portions of the Indictment, pp. 10a-15a, *infra*.

sulted in the conviction of Charles J. Piluso and acquittal of the other two Defendants.[3]

When Petitioner recovered from his illness, he was tried before District Judge Albert V. Bryan, Jr.; and on April 26, 1974 was found guilty by the jury on all three Counts. On May 17, 1974, pursuant to Rule 34, Federal Rules of Criminal Procedure, Judge Bryan arrested the judgment. He held the Counts in the Indictment did not charge an offense "because the unlawful activity referred to in the indictment as being promoted or furthered by the Defendant, Louis J. Pomponio, Jr., namely Section 215 of Title 18 of the U.S. Code and the New York Penal Code, in my view did not come within the unlawful activity definition of Section 1952 of Title 18." App. IV, p. 9a, *infra*.

The Government appealed from this decision and the Court below reversed Judge Bryan's ruling. "Concededly," the Court stated, "the crime of bribery was originally limited to cases involving the corruption of those in the public service, and some statements of the limited legislative history of the Act might appear to support the position of the defendants." App. I, p. 5a, *infra* (footnotes omitted throughout). Nevertheless, the Court rejected Petitioner's contention that the concept of "bribery" as used in the Travel Act did not include commercial bribery, because both State and Federal statutes "have also extended the concept of bribery into areas of private conduct which we think appropriately fall within the ambit of the Travel

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[3] Piluso's conviction was affirmed in the Court below in the same opinion that reversed the District Court Order arresting judgment in Petitioner's case; and a separate Petition for Certiorari to review his conviction is being filed.

Act." *Ibid.* Purporting to rely upon the decision of this Court in *United States* v. *Nardello,* 393 U.S. 286 (1969) (*"Nardello"*), the Court below held that the acts alleged in the Indictment fell within the generic term "bribery" as used in the Travel Act.

The Court failed to decide the issues raised by the Government's reliance upon 18 U.S.C. § 215—whether it was a "bribery" statute altogether and how it could be applied against a payor, when it in terms referred solely to "receipt"—with the assertion that the reference thereto in the Indictment served "only as a background identification of the unlawful activities." App. I at p. 7a, *infra.*

REASONS FOR GRANTING THE WRIT

As this Court well knows, the Travel Act is a statute with such broad, imprecise and ambiguous language that it generates legal problems and difficulties for all participants in the administration of the criminal law, prosecutors, defendants and Federal courts;[4] including this Court.[5]

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[4] E.g., *United States* v. *Lightfoot,* 506 F.2d 238 (D.C. Cir. 1974); *United States* v. *Brown,* 505 F.2d 261 (4th Cir. 1974); *United States* v. *Zemater,* 501 F.2d 540 (7th Cir. 1974); *United States* v. *Isaacs,* 493 F.2d 1124, 1146-1149 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974); *United States* v. *Archer,* 486 F.2d 670 (2nd Cir. 1973); *United States* v. *Altobella,* 442 F.2d 310 (7th Cir. 1971); *United States* v. *Botticello,* 422 F.2d 832 (2nd Cir. 1970); *United States* v. *Hawthorne,* 356 F.2d 740 (4th Cir.), *cert. denied,* 384 U.S. 908 (1966); *Marshall* v. *United States,* 355 F.2d 999 (9th Cir.), *cert. denied,* 385 U.S. 815 (1966); *United States* v. *Anderson,* 368 F. Supp. 1253 (D. Md. 1973); *United States* v. *Machi,* 352 F. Supp. 1173 (E.D. Wisc. 1972).

[5] E.g., *Erlenbaugh* v. *United States,* 409 U.S. 239 (1972); *Rewis* v. *United States,* 401 U.S. 808 (1971) (*"Rewis"*); *Nardello.*

This case presents a new and an unprecedented expansion of the Travel Act beyond both its language and its history. There is deep doubt that the commercial bribery alleged in the Indictment can be brought within the unlawful activity of "bribery" specified in the Travel Act. Likewise, serious questions are raised by the charge that the *making of payments* to a loan officer of a federally insured bank can create a crime under the Travel Act when, in 18 U.S.C. § 215—the statute upon which this phase of the Indictment is based—Congress specified that only the *"receipt" of such payments* should be the crime and in any event did not regard the crime as "bribery." Consideration and decision of these questions by this Court are essential, not only to rectify a miscarriage of justice, but also to resolve the evident conflict between the decision below and other decisions, the obvious misreading of this Court's decisions, and the impermissible warping and stretching of the Travel Act. This case is an especially appropriate vehicle for the resolution of these issues, since they are presented in the uncluttered context of a Motion to Arrest the Judgment of Conviction.

I.

THE FEDERAL COURT DECISIONS ON WHETHER THE TERM "BRIBERY" IN THE TRAVEL ACT INCLUDES "COMMERCIAL BRIBERY" ARE INCONSISTENT AND REQUIRE CLARIFICATION BY THIS COURT

There is manifest disagreement among the Federal Courts as to whether the term "bribery" as used in the Travel Act includes "commercial bribery." Irreconcilable conflict is evident between the decision below, holding that the Travel Act may be extended to commercial bribery, and *United States* v. *Niedelman,* 356 F.Supp.

979 (S.D.N.Y. 1973) (*"Niedelman"*), set out in pertinent part in Appendix VI at pp. 15a-20a, *infra,* which held precisely to the contrary. In addition, Judge Bryan in this case reached a conclusion different from the one reached by Judge Lewis, who sits in the same Court, in the trial of the other Defendants named in this very Indictment. Likewise, there are summary decisions in the Southern District of New York which reached a conclusion contrary to that reached by Judge Whitman Knapp of that same Court in *Niedelman,* App. VI at p. 18a, *infra,* 356 F.Supp. at 981.[6]

There could hardly be a more conspicuous and compelling spectacle of confusion calling for clarification by this Court than contradictory results reached by Judges sitting in the very same Courts. Different Judges both in the Southern District of New York and the Eastern District of Virginia have accorded inconsistent treatment to defendants charged with essentially identical offenses. In terms of considered judicial opinions, there is now presented the head-on conflict between the decision below and *Niedelman.* This unseemly division among the Federal Courts will inevitably expand and deepen until this Court resolves the issue.

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[6] *United States* v. *Maiolo,* 72 Cr. 1123; *United States* v. *Endresen,* 73 Cr. 85; *United States* v. *Hohn,* 72 Cr. 1124; and *United States* v. *Callahan,* 72 Cr. 1126; all of which are unreported. Only in the *Callahan* case did the Court write an opinion and the pertinent portion of that opinion is set out in App. VII, p. 20a, *infra.*

II.

THE DECISION BELOW MISCONSTRUES AND IS IN CONFLICT WITH UNITED STATES v. NARDELLO, 393 U.S. 286 (1969)

Dramatically highlighting the necessity for this Court to speak is the fact that the decision below and the *Niedelman* decision both rely upon and proclaim allegiance to the strictures of this Court in *Nardello*. According to the Court below, the touchstone established in *Nardello* was whether the conduct alleged to be unlawful was generically similar to an unlawful activity named in the Travel Act; and, purporting to apply this test, the Court below held that commercial bribery (i.e., involving payments to private individuals) was sufficiently similar in kind to bribery of public officials that the Government might read and apply the Travel Act as though it included "commercial bribery". According to the *Niedelman* Court, the test laid down by this Court in *Nardello* was attuned to the purposes which Congress hoped to achieve in the Travel Act: "(1) to assist the states in fighting the depredations of the organized underworld [citations omitted]; and (2) insofar as possible, to achieve an interpretation having a uniform effect throughout the nation [citations omitted]." App. VI at p. 18a, *infra;* 356 F. Supp. at 981. Applying these twin tests upon which it held that *Nardello* rested and established for the Federal Courts to follow, the *Niedelman* Court concluded that "commercial bribery" could not properly be included within the term "bribery" as used by Congress in the Travel Act because (1) commercial bribery was never considered to be a typical tool of the underworld, in contrast to the traditional bribery of public officials; and (2) to include "commercial bribery" would be to create a lack of uniformity throughout the

nation, whereas in *Nardello,* because of the overlapping character of state statutes dealing with "blackmail" and "extortion," uniformity was achieved by ruling that "extortion" included blackmail by private individuals.[7] Relying upon the legislative history as a strong indicator of the Congressional intention, as this Court did in *Nardello, Niedelman* found that the legislative history of the Travel Act contains "not so much as a hint" that commercial bribery was to be included. App. VI at p. 19a, *infra,* 356 F.Supp. at 981.

In this conflict over how the instructions of this Court in *Nardello* are to be applied, the approach derived and followed by the *Niedelman* Court is plainly the more faithful. The Court below disregards the legislative history so extensively recited and relied upon by this Court in *Nardello,* particularly the contrast drawn by this Court between the terms "extortion" and "bribery" as used in the Travel Act. As this Court noted in *Nardello,* a principal Government argument was, "[s]ince Pennsylvania's extortion statute covers corrupt acts by public officials, the Government suggests that appellee's construction of 'extortion' renders the bribery prohibition superfluous." 393 U.S. at 293 n. 11. Manifestly, this Government position necessarily recognized that "bribery" in the Travel Act does not include bribery of private individuals, i.e., "commercial bribery."[8]

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[7] *Compare* the discussion of the State statutes dealing with extortion activities in *Nardello,* 393 U.S. at 294-295, *with* Note, *Control of Nongovernmental Corruption by Criminal Legislation,* 108 U. Pa. L. Rev. 848 (1960), which establishes that at about the time the Travel Act became law, only thirteen States had a general commercial bribery statute while seventeen others had statutes directed to payments made to particular types of employees. *Id.* at 849, 864, 866.

[8] "Furthermore, joined in the same clause with extortion is an

Moreover, this Court relied upon a letter written by Mr. Justice (then Deputy Attorney General) White which likewise demonstrated the contrast which the Government drew between the broad reach of "extortion" and the restricted one of "bribery" in the Act. The letter objected—successfully—that a proposed amendment, which would have limited the offenses specified in Subsection (b)(2) of the Travel Act, "extortion, bribery, or arson", to business enterprises involving the offenses specified in Subsection (b)(1), "eliminated from the purview of the bill extortions not related to the four above offenses [gambling, liquor, narcotics or prostitution] but which are, and have historically been, activities which involve organized crime. Such activities as the 'shakedown racket', 'shylocking' (where interest of 20% per week is charged and which is collected by means of force and violence, since in most states the loans are uncollectible in court) and labor extortion. It also removes from the purview of the bill *bribery of state, local and federal officials* by the organized criminals unless we can prove that the bribery is directly attributable to gambling, liquor, narcotics or prostitution." 393 U.S. at 292 n. 9 (emphasis is added throughout this Petition).

From the beginning, the intention was evident that the term "bribery" signified bribery of public officials; there was no suggestion that it could or would ever be extended to payments to private persons. In his ini-

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offense which has as its normal focus the corruption of public officers: interstate travel to promote 'bribery' is also forbidden. In this context, reading 'extortion' as confined only to acceptance of unauthorized fees by public officials, in states which retain that classification, would render the 'extortion' branch of the clause practically superfluous." *Brief for United States* in *Nardello*, 9.

tial testimony in support of the legislation, Attorney General Kennedy repeatedly specified "corruption of local officials" as one of the evils against which the proposed legislation was directed.[9]

This continued to be the thrust of the legislative history, as what ultimately became the Travel Act was proposed and explained to the Congress by the Department of Justice, as the Congress adopted it and intended it to be applied, and as this Court recognized in *Nardello.*

As the law then stood, bribery did not include payments to private persons, but was confined to the bribery of public officials. "Bribery has traditionally focused upon corrupt activities by public officials." *Nardello,* 393 U.S. at 293 n. 11. Consequently, the Department of Justice would have proposed expressly to include "commercial bribery", and Congress would have expressed "commercial bribery", had there in historical fact been any intention that the term "bribery" include payments to private persons.

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[9] "As has been pointed out so often, gambling, liquor violations, narcotics, *bribery, and corruption of local officials* and labor racketeering and extortion go hand in hand.

• • •

"Organized crime is nurtured by a number of activities, but the primary source of its growth is illicit gambling. From huge gambling profits flow the funds to bankroll the other illegal activities I have mentioned including the *bribery of local officials.*

"The main target of our bill is interstate travel to promote gambling. It also is aimed at the huge profits in the traffic in liquor, narcotics, prostitution as well as the use of these funds for *corrupting local officials* and for their use in racketeering in labor and management. Thus, when we speak of unlawful business it is business engaged in the aforementioned improper activities." *Hearings on S. 1653-1658, S. 1665 Before the Senate Committee on the Judiciary,* 87th Cong., 1st Sess. 2 (1961).

The decision below and the Indictment herein thus stand in disregard of the legislative history, the intention of Congress, and the decision of this Court in *Nardello*. To insure that the Travel Act is construed correctly and that *Nardello* is adhered to faithfully in this case and in all subsequent Travel Act cases, this Court should grant review of the decision below.

III.

THE DECISION OF THE COURT BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISION IN REWIS v. UNITED STATES, 401 U.S. 808 (1971).

In *Rewis* v. *United States*, 401 U.S. 808 (1971), this Court held that affirmative expression by Congress was essential to criminalize the conduct there alleged by the Government as sufficient to constitute a violation of the Travel Act. This Court relied upon the Congressional intention and the language of the statute, and was *"struck by what Congress did not say." Id.* at 811-812. Congress did *not* say *"commercial* bribery." [10]

This Court emphasized in *Rewis* as it had in *Nardello* that in the Travel Act Congress was aiming at those engaged in unlawful or illegal businesses for organized crime. 401 U.S. at 811 n. 6. As Attorney General Kennedy testified in introducing the legislation, "American citizens who are not connected with organized gambling and organized crime have nothing to fear. The only toes tread on here are those of racketeers and hoodlums." *Hearing on S. 1653-1658, S. 1665 Before the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. 17 (1961).

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[10] It likewise did *not* say *"payment"* in 18 U.S.C. § 215. See Part IV, p. 16, *infra*.

As earlier noted, there is not the slightest intimation in the Indictment that any of the Defendants in this case were engaged in any such conduct. The legal approaches which the Court below found necessary to embrace in order to reverse Judge Bryan's decision arresting judgment are thus out of step and sympathy not only with *Nardello,* but with *Rewis* as well.

Moreover, in *Rewis* this Court indicated a skeptical view as to whether Congress intended in the Travel Act to "transform relatively minor state offenses into federal felonies." *Rewis,* 401 U.S. at 812. The Court below has approved precisely such a transformation. While the New York commercial bribery statute cited in the Indictment creates a misdemeanor with a maximum penalty of only three months,[11] by encapsulating it within the Indictment charging a violation of the Travel Act its effect has been transformed into a felony, with a maximum penalty of five years.[12] Whether such a result comports with *Rewis* is a question which plainly merits the attention of this Court.

IV.

THE USE OF THE TRAVEL ACT TO EXPAND THE SCOPE AND PENALTY OF 18 U.S.C. § 215 ALSO MERITS CONSIDERATION BY THIS COURT

Stretching the boundaries of criminal conduct beyond those expressed and intended by the Congress in

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[11] Commercial Bribery is classified by New York as a Class B misdemeanor. Such misdemeanors carry a maximum term of imprisonment of three months. See p. 4, *supra.* New York has a "bribery" statute applicable only to bribery of "a *public* servant" (New York Penal Law § 200.00, p. 4, *supra*); and this statute is categorized as a Class D felony which carries a maximum term of imprisonment of seven years. *Ibid.*

[12] The sentence imposed upon the Defendant Piluso by Judge Lewis for his conviction under this Indictment was two years.

the Travel Act is reflected in this case not only by the enlargement of the term "bribery" to encompass the separate category of commercial bribery, but also by the expansion of the reach of 18 U.S.C. § 215 beyond any areas of conduct heretofore considered as falling within that statute.[13]

To begin with, 18 U.S.C. § 215 is not a "bribery" statute and any violation thereof thus cannot fall within the unlawful activity of "bribery" specified in the Travel Act. The crime of bribery is established in an entirely different provision of the Criminal Code, 18 U.S.C. § 201, which deals principally with bribery of public officials and includes bribery of witnesses in their official acts and duties. Further, the intention to influence official conduct is an expressed element of the crime of bribery as defined in § 201, but is not required for a violation of receipt by the bank officer, the offense established in 18 U.S.C. § 215. Section 215 is directed exclusively to benefits which a bank officer "by reason of his peculiar position of * * * influence or trust exacts from another." *Razette* v. *United States,* 199 F.2d 44, 48 (6th Cir.), *cert. denied,* 344 U.S. 904 (1952). Violations of such statutes are classified generically as "graft" rather than "bribery." *Ibid.*

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[13] Inasmuch as the Indictment inextricably melds both statutes, dismissal is required if *either* has been improperly invoked. As Judge Bryan plainly recognized, we cannot know whether the jury "came back on the right one or the wrong one, so if [any] of those is * * * improper * * *, then the conviction cannot be maintained." Transcript of proceedings in District Court, May 17, 1974. "[T]he proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates* v. *United States,* 354 U.S. 298, 312 (1957); *United States* v. *Johns,* 444 F.2d 58 (5th Cir. 1971).

Independent and apart from its manifestly unwarranted assumption that 18 U.S.C. § 215 was in fact a "bribery" statute, the Court below patently misapplied 18 U.S.C. § 215 in sustaining an Indictment which charged that it was violated by "*giving* the said Sidney M. Zneimer checks" and "the *paying* of commissions to an officer of a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, for procuring loans from said bank * * *." App. V at pp. 13a-14a, *infra*. The Court below did not attempt the impossible task of accommodating its conclusion to the legislative history, context or text, each of which demonstrates that 18 U.S.C. § 215 was knowingly restricted to *receipt* by a Congress fully aware that receipt and payment normally go hand in hand. The legislative history of the Federal Reserve Act of 1913, from which 18 U.S.C. § 215 is derived, reveals that this provision was aimed only at the bank officer. "In this section it is sought * * * to end the illegitimate practice whereby officers of national banks have heretofore profited at the expense of borrowers by charging a commission or brokerage for the obtaining of loans." House Rep. No. 69, 63rd Cong., 1st Sess. 72 (1913). Accordingly, in the statutory context of Chapter 11 of Title 18, § 217 in addition to § 215, prohibits only the receiving, § 224 prohibits only the giving, and §§ 201, 203, 209-214 and 216 prohibit both the giving and the receiving. Beyond doubt, Congress knew quite well what it was doing, and expressed precisely what it intended, when it outlawed only receiving in § 215. In complete harmony with this legislative history and context, the statutory text itself is unquestionably confined strictly to receipt; see pp. 4-5, *supra*.

Evidently the Government in its Indictment and the Court below in its consideration of this case recognized that the Petitioner, not being a bank officer and having given rather than having received a commission, could not be charged directly under 18 U.S.C. § 215. But as matters now stand, they have achieved by indirection what was thus plainly precluded by direction. Petitioner is being criminally charged for acts in this case which Congress has meticulously declined to characterize as criminal in 18 U.S.C. § 215. And the magic ingredient which has been utilized to accomplish this legal legerdemain is the Travel Act.

Such irrational jurisprudential acrobatics manifestly raise issues critical to the administration of the criminal laws and demand consideration by this Court. Could the Congress, which so carefully confined criminality to the recipient when it studied the subject directly, have intended that the payor be subjected to criminal liability merely because an additional statutory citation has been added to the indictment? Certainly there is no clear or convincing legislative history to this effect; and in the absence of such legislative history it would appear impermissible to import criminality into a substantive offense expressly not made criminal by the Congress through such a device as charging a violation of the Travel Act.[14] The entire Indictment is an unprecedented effort to extend the frontiers of criminality beyond the clear prescriptions and expressed intendments of Congress.

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[14] The references to conspiracy and to aiding and abetting in the Indictment do not alter this issue. The conspiracy charged is one to violate the Travel Act and the offenses which were charged as having been aided and abetted were likewise violations of the Travel Act.

This misuse of the Travel Act in this Indictment, sustained by the decision below, is further reflected in the anomaly which arises with respect to penalty. Congress has provided that the maximum penalty for violation of 18 U.S.C. § 215 is one year. By charging the violation of 18 U.S.C. § 215 as an unlawful activity under the Travel Act, rather than as an offense by itself, however, the prosecutors have here transformed a one year misdemeanor into a five year felony. There is certainly no indication that when Congress enacted the Travel Act, it intended that such gross distortions were to be visited upon its carefully structured statutory scheme.[15]

The kindest description of the Indictment and of the decision below sustaining it is that they are grounded upon ambiguities in the criminal laws. In such a case the decision below is not to be sanctioned for it cannot be accommodated with decisions of this Court. "In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952)." *United*

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[15] Similar distortions would arise where the charge was one of conspiracy. While 18 U.S.C. § 371, the Federal conspiracy statute, contains a five-year penalty, it also provides that if the object of a conspiracy is a misdemeanor only, "the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." Consequently, if a defendant is charged with a conspiracy to violate 18 U.S.C. § 215, the maximum punishment would be one year, whereas if he were charged with conspiracy to violate the Travel Act, the maximum punishment would be five years.

States v. *Bass*, 404 U.S. 336, 347-348 (1971) ("Bass"). "[T]his being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity." *United States* v. *Enmons*, 410 U.S. 396, 411 (1973); *Bass*, 404 U.S. at 347, quoting *Rewis* 401 U.S. at 812. "In *Rewis*, we declined to accept an expansive interpretation of the Travel Act." *Bass*, 404 U.S. at 349. This Court should not permit the decision below, which imposes so blatantly expansive an interpretation of the Travel Act, to go unreviewed.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the Judgment and Opinion of the Fourth Circuit.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1667

UNITED STATES OF AMERICA, *Appellant,*

v.

LOUIS POMPONIO, *Appellee.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

No. 74-1668

UNITED STATES OF AMERICA, *Appellee,*

v.

CHARLES J. PILUSO, *Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued October 4, 1974 Decided February 7, 1975

Before BUTZNER, RUSSELL and FIELD, Circuit Judges.

Frank W. Dunham, Jr., Assistant United States Attorney, (David H. Hopkins, United States Attorney, on brief) for Appellant in No. 74-1667; Alan Y. Cole (Lee A. Schutzman & Cole and Groner on brief) for Appellee in No. 74-1667; Albert J. Ahern, Jr. for Appellant in No. 74-1668;

Thomas K. Moore, Assistant United States Attorney, (Brian P. Gettings, United States Attorney, on brief) for Appellee in No. 74-1668.

FIELD, Circuit Judge:

The principal question on these appeals is the sufficiency of an indictment returned by a grand jury in the Eastern District of Virginia against Louis J. Pomponio, Jr., along with his brothers, Peter and Paul Pomponio, and their attorney, Charles J. Piluso, charging them with violating and conspiring to violate the Travel Act, 18 U.S.C. § 1952.[1]

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[1] 18 U.S.C.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended Pub. L. 91-513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.

The charges in the indictment stemmed from payments totaling over $300,000 allegedly made by the defendants to Sidney M. Zneimer, a Vice President of the Royal National Bank in New York City, for the purpose of influencing his conduct relative to a number of loans made by the bank to corporations owned or controlled by the Pomponios.

The indictment tracks the language of the statute charging that the defendants "did willfully travel from the State of Virginia to the State of New York, with the intent to promote, manage, carry on, and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crime of bribery, in violation of the laws of the State of New York (New York Penal Law Article 180)[2] and of the United States (Title 18, United States Code, Section 215);[3] the said unlawful activity relating to the efforts of Louis J. Pomponio, Jr., Charles J. Piluso and Paul Pomponio to influence

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[2] § 180.00 Commercial bribing

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

Commercial bribing is a class B misdemeanor.

[3] § 215. Receipt of commissions or gifts for procuring loans.

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

Sidney M. Zneimer in the performance of his duties at the Royal National Bank by giving the said Sidney M. Zneimer checks, as detailed in the table below * * *."[4]

Prior to trial the defendants filed a motion to dismiss the indictment on the ground that neither commercial bribery under the New York statute nor the receipt of commissions or gifts by a bank official proscribed by section 215 of the federal code constitute "unlawful activity" within the purview of section 1952. Judge Oren R. Lewis declined to grant the motion and set the case for trial. However, Louis J. Pomponio, Jr., was hospitalized because of illness and the trial proceeded against the other three defendants. The court granted a motion for judgment of acquittal of Peter Pomponio and the jury returned a verdict of not guilty with respect to his brother Paul. Charles J. Piluso was found guilty on all three counts and has appealed his conviction in Case No. 74-1668. Thereafter, Louis J. Pomponio, Jr. was tried before Judge Albert V. Bryan, Jr., and was found guilty by the jury. During the course of this trial, Pomponio's counsel challenged the sufficiency of the indictment in a motion for judgment of acquittal. Judge Bryan, understandably, felt bound by the earlier ruling of Judge Lewis and denied the motion. However, Judge Bryan granted Pomponio's post-trial motion for arrest of judgment, holding that "Section 215 of Title 18 of the U. S. Code and the New York Penal Code, in my view do not come within the unlawful activity definition of Section 1952 of Title 18." The government has appealed this action in Case No. 74-1667.[5]

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[4] Although the indictment contained one conspiracy count under 18 U.S.C. § 371 and eight substantive counts, the government proceeded to trial on the conspiracy count and only two of the substantive counts, Counts Nos. V and IX. The quoted language is from Count No. V of the indictment, but charging language to the same effect was employed in the conspiracy count as well as Count No. IX.

[5] The motion in arrest of judgment was granted pursuant to Rule 34, Fed. R. Cr. P., and is appealable under 18 U.S.C. § 3731. *See* Esposito v. United States, 492 F.2d 6 (7 Cir. 1974).

Primarily, the defendants contend that the word "bribery" as used in the Travel Act is intended to mean bribery in the classic sense of the common law which was limited to the corruption of public officials in the administration of their public trust and does not extend to such conduct by private individuals. Concededly, the crime of bribery was originally limited to cases involving the corruption of those in the public service,[6] and some statements in the limited legislative history of the Act might appear to support the position of the defendants.[7] However, while the states and the federal government have enacted statutes dealing with the corruption of public officials, they have also extended the concept of bribery into areas of private conduct which we think appropriately fall within the ambit of the Travel Act.[8] "There can be no question but that any crime of bribery involves moral turpitude."[9] and we discern no reason why the Congress, in using the term "bribery," intended that it be limited to the corruption of public officials.[10] We find the answer to this contention of the defendants in *United States* v. *Nardello*, 393 U.S. 286, 292-293 (1969), where a similar argument with respect to

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[6] *See* 3 Wharton's Criminal Law and Procedure, §§ 1380, et seq., (R. Anderson Ed. 1957).

[7] See Hearing on S. 1654-58, S. 1665 Before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961).

[8] *See, e.g.*, 18 U.S.C. §§ 201, 203, 210, 211 and 214; N.Y. Penal Law §§ 200.00 and 200.10 (McKinney 1973), bribery of a public servant and bribe receiving by a public servant; N. Y. Penal Law §§ 180.15 and 180.25 (McKinney 1967), bribery of a labor official and bribe receiving by a labor official; N. Y. Penal Law §§ 180.40 and 180.45 (McKinney 1967), sports bribing and sports bribe receiving.

[9] United States v. Esperdy, 285 F.2d 341, 342 (2 Cir. 1961).

[10] In the Southern District of New York one judge has reached the conclusion that commercial bribery under the New York statute does not fall within section 1952. United States v. Niedelman, 356 F.Supp. 979 (1973). However, he acknowledged that "[s]imilar contentions have heretofore been considered and rejected in this District [in four other decisions]." *Id.* at 981.

the meaning of the word "extortion" in the Act was urged upon the Court. In rejecting this argument the Court stated:

> "Appellees suggest, however, that Congress intended that the common-law meaning of extortion—corrupt acts by a public official—be retained. If Congress so intended, then § 1952 would cover extortionate acts only when the extortionist was also a public official. Not only would such a construction conflict with the congressional desire to curb the activities of organized crime rather than merely organized criminals who were also public officials, but also § 1952 imposes penalties upon any individual crossing state lines or using interstate facilities for any of the statutorily enumerated offenses. The language of the Travel Act, 'whoever' crosses state lines or uses interstate facilities, includes private persons as well as public officials."

Paraphrasing the language of the Court in *Nardello,* "[i]n light of the scope of the congressional purpose we decline to give the term [bribery] an unnaturally narrow reading * * * and thus conclude that the acts for which [defendants] have been indicted fall within the generic term [bribery] as used in the Travel Act." 393 U.S. at 296.

The defendants further contend that since 18 U.S.C. § 215 criminalizes only the act of the bank officer who receives the proscribed thing of value, they as payors could not be convicted of an offense under that statute [11] and, accordingly, it was improperly designated as an "unlawful activity"

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[11] Incident to this contention, counsel in their arguments and briefs discussed at some length the dichotomy with respect to the question of whether the payor can be convicted as an aider and abettor under a statute such as 18 U.S.C. § 215. *See* United States v. Kenner, 354 F.2d 789 (2 Cir. 1965); United States v. Bowles, 183 F.Supp. 237 (D.C. Me. 1958); *cf.* May v. United States, 175 F.2d 994 (D.C. Cir. 1949); *see also* United States v. Johnson, 337 F.2d 180 (4 Cir. 1964).

in the indictment.[12] As pointed out in *United States* v. *Wechsler*, 392 F.2d 344 (4 Cir. 1968), the fallacy in such an argument lies in a too heavy reliance on the role played by section 215 in the indictment, and elides the fact that it serves "only as a background identification of the unlawful activities."[13] The "unlawful activity" specified in the Act may be bribery under either state or federal law and reference to such law is necessary only to identify the type of "unlawful activity" in which the defendants intended to engage. Proof that the unlawful objective was accomplished or that the referenced law has actually been violated is not a necessary element of the offense defined in section 1952. *See United States* v. *Rizzo*, 418 F.2d 71 (7 Cir. 1969); *McIntosh* v. *United States*, 385 F.2d 274 (8 Cir. 1967). Accordingly, we find it sufficient that the indictment charged the defendants with interstate travel with the intent, *inter alia*, to facilitate the violation of the federal statute by Zneimer. Finally, the defendants argue that our construction of the Act improperly escalates these underlying misdemeanors to federal felonies, but such a contention has been summarily rejected by the courts. *United States* v. *Karigiannis*, 430 F.2d 148 (7 Cir. 1970); *United States* v. *Brennan*, 394 F.2d 151 (2 Cir. 1968).

We have considered the other points raised on Piluso's appeal and find no reversible error. Accordingly, the conviction in No. 74-1668 is affirmed. The order of the district court granting Pomponio's motion in arrest of judgment in No. 74-1667 is reversed, and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN CASE NO. 74-1668.

REVERSED AND REMANDED
IN CASE NO. 74-1667.

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[12] Defendants take the position that if either the New York commercial bribery law or the federal statute was improperly included in the indictment, the indictment must fall. In view of our disposition of the case, we find it necessary to reach this point.

[13] 392 F.2d at 346.

APPENDIX II

CLERK'S MEMORANDUM

Enclosed is a copy of the opinion. Judgment was entered on February 7, 1975. Counsel desiring to tax costs against the unsuccessful party under Rule 39, FRAP, is requested to furnish an itemized statement from the printer showing the actual cost per page for reproducing the brief and appendix.

WILLIAM K. SLATE, II, *Clerk*

APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1667

UNITED STATES OF AMERICA, *Appellant*,
v.
LOUIS POMPONIO, *Appellee*.

Order

Upon consideration of appellee's petition for rehearing and suggestion for rehearing on en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is, therefore, ORDERED, That the petition for rehearing be and it is hereby denied.

For the Court—By Direction.

/s/ WILLIAM K. SLATE, II
Clerk

A True Copy, Teste:

WILLIAM K. SLATE, II
Clerk

By /s/ FRANCES S. SEWELL
Deputy Clerk

Filed March 4, 1975

WILLIAM K. SLATE, II
Clerk

APPENDIX IV

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 269-73-A

THE UNITED STATES

v.

LOUIS J. POMPONIO, JR., *Defendant.*

THE COURT: I think the Court of Appeals ought to settle it. I have regard, of course, for the position of my associate, Judge Lewis, on the same matter. My disagreement with him is just that, and no more. However, the case is now before me for decision on this motion for arrest of judgment. I think the motion is well taken.

I am relieved to find that the Government, in accordance with the *Esposito* case, can appeal. I think the Defendant will be hard put to plead double jeopardy if the Government is successful in its appeal, having cited that case to me in support of its argument that the verdict may be reinstated if it is not reversed on other grounds.

I will, therefore, in accordance with Rule 34, arrest the judgment on the specific ground—and lest there be any mistake about it, I want to make sure that the specific ground of the arrest of judgment is that the indictment, Counts, I, V and IX do not charge an offense, and the reason I am of the view that they do not charge an offense is because the unlawful activity referred to in the indictment as being promoted or furthered by the Defendant, Louis J. Pomponio, Jr., namely, Section 215 of Title 18 of the U. S. Code and the New York Penal Code, in my view do not come within the unlawful activity definition of Section 1952 of Title 18.

I do not believe that there would be a requirement, before the Government would appeal, that sentence be im-

posed in the case and, therefore, I will postpone sentencing, retaining jurisdiction of the case, however, for sentencing should on appeal the case be reversed.

I hereby certify that the foregoing is a true transcript of the oral statement of the Court from the Bench.

/s/ FRANCES WEBB
Reporter

APPENDIX V

Filed in Open Court Sep. 24, 1973
Clerk, U. S. District Court
Alexandria, Virginia

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 269-73

UNITED STATES OF AMERICA

v.

LOUIS POMPONIO, JR.

JULY *1972* SPECIAL TERM GRAND JURY—At Alexandria

THE GRAND JURY CHARGES:

A. 1. That the defendants, LOUIS J. POMPONIO, JR., PAUL POMPONIO and PETER POMPONIO, hereinafter referred to either individually or as "the POMPONIOS," at all times mentioned in this indictment, maintained residences and offices in the State of Virginia and were endeavoring through a network of family controlled corporations to build, own and operate high-rise buildings in Northern Virginia and the District of Columbia.

2. That the defendant, CHARLES J. PILUSO, Esquire, at all times material herein, maintained a residence and an office in the State of Virginia and was associated in the endeavors of the brothers referred to in paragraph A. 1. above.

3. That Sidney M. Zneimer, at all times material herein, resided in the State of New York and was a vice president of the Royal National Bank and worked at the offices of said bank located in New York City in the State of New York with general responsibility for reviewing and evaluating requests for construction loans, arranging for participation by other lending organizations when an approved loan request was contingent on such arrangements being made, and general administration of the loan, including authorization of progress advances.

4. That at all times material herein, the Royal National Bank was a national banking institution located and conducting business in the State of New York.

5. That at all times material herein:

a. Martin Van Buren Corporation was owned and controlled by the POMPONIOS for the principal purpose of owing land and the Martin Van Buren Building located thereon during and subsequent to construction of said building.

b. James Polk Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the James Polk Building located thereon during and subsequent to construction of said building.

c. Abington Realty Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the Pomponio Plaza East Building located thereon during and subsequent to construction of said building.

d. National Center Corporation was owned and controlled by the POMPONIOS for the principal purpose of obtaining and owning land and developing on it what later became known as the National Center in Arlington, Virginia.

e. Federal Realty and Development Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the Commonwealth Building located thereon during and subsequent to construction of said building.

f. James Buchanan Corporation was owned and controlled by the POMPONIOS for the principal purpose of owning land and the James Buchanan Apartments located thereon during and subsequent to construction of said apartments.

g. Zachary Taylor Corporation was controlled by the POMPONIOS for the principal purpose of owning land and the Zachary Taylor Building located thereon during and subsequent to construction of said building.

* * *

i. Virginia Corporation was controlled by the POMPONIOS for the principal purpose of owning land and the Patrick Henry Building located thereon during and subsequent to construction of said building.

6. That at all times material herein, it was a violation of the criminal laws of the State of New York for any person to confer any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

7. That at all times material herein, Real Equity Consultants was a corporation controlled, owned and operated by Sidney M. Zneimer for the benefit of Sidney M. Zneimer.

B. That commencing on or about September 1, 1967, and continuously thereafter up to and including the date of this indictment, the exact dates to the grand jurors being unknown, in the Eastern District of Virginia and elsewhere, the defendants, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other and with Sidney M. Zneimer, an unindicted co-conspirator, and with divers other persons to the grand jury unknown, to commit certain offenses against the United States, in violation of the provisions of Section 1952 of Title 18, United States Code in that the defendants would travel and willfully cause others to travel in interstate commerce and that they would use and willfully cause others to use facilities in interstate commerce, including interstate banking facilities, * * *, air terminals, commercial limosine service, credit cards, and commercial air travel, all of the above with the intent to promote, manage, establish, and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crimes of commercial bribery, in violation of the laws of the State of New York and the paying of commissions to an officer of a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, for procuring loans from said bank, in violation of Title 18, United States Code, Section 215, and it was further a part of the conspiracy that the defendants would thereafter perform and cause others to perform acts promoting, managing, establishing, and carrying on of said unlawful activities and acts facilitating the promoting, managing, establishing, and carrying on of said unlawful activity.

* * * *

COUNT V

B. From on or about March 12, 1970 through November 19, 1971, in the Eastern District of Virginia and elsewhere, LOUIS J. POMPONIO, JR., * * * did willfully travel from the

State of Virginia to the State of New York, with the intent to promote, manage, carry on, and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crime of bribery, in violation of the laws of the State of New York (New York Penal Law Article 180) and of the United States (Title 18, United States Code, Section 215); the said unlawful activity relating to the efforts of LOUIS J. POMPONIO, JR., CHARLES J. PILUSO and PAUL POMPONIO to influence Sidney M. Zneimer in the performance of his duties at the Royal National Bank by giving the said Sidney M. Zneimer checks, as detailed in the table below, and drawn on the Royal National Bank of New York, payable to Real Equity Consultants, Inc., and that thereafter the defendants did perform and attempt to perform the acts of promoting, managing, establishing and carrying on and facilitating the promoting, managing and carrying on of said unlawful activity.

Date of Check	No. of Check	Account	Amount
3/12/70	294	James Buchanan Corp	$25,000
3/13/70	101A & T-1	Zachary Taylor Corp.	25,000
5/27/70	248	Zachary Taylor Corp.	25,000
10/ 5/70	1010	Columbia Plaza Corp.	25,000
1/ 4/71	145	Virginia Corp.	25,000
1/11/71	1186	Columbia Plaza Corp.	25,000
10/ 6/71	122	Chester Arthur Corp.	25,000

(Violation of Title 18, United States Code, Sections 1952 and 2)

* * * *

COUNT IX

B. On or about December 13, 1971, in the Eastern District of Virginia, LOUIS J. POMPONIO, JR., * * * caused Lewis Payne to travel from the State of Virginia to the State of New York, with the intent to promote, manage, carry on and facilitate the promoting, managing, establishing and

carrying on of an unlawful activity, said unlawful activity being the crime of bribery, in violation of the laws of the State of New York (New York Penal Law Article 180) and of the United States (Title 18 United States Code, Section 215); the said unlawful activity relating to the efforts of Louis J. Pomponio, Jr., Paul Pomponio and Charles J. Piluso to influence Sidney M. Zneimer in the performance of his duties at the Royal National Bank, and that thereafter the defendants did perform and attempt to perform the acts of promoting, managing, establishing and carrying on, and facilitating the promoting, managing and carrying on of said unlawful activity. (Violation of Title 18, United States Code, Sections 1952 and 2)

APPENDIX VI

UNITED STATES DISTRICT COURT,
S.D. NEW YORK,
CRIMINAL DIVISION.

April 6, 1973

No. 72 Cr. 1127

United States of America,

v.

Hilda F. Niedelman, *Defendant.*

* * * * * * * * * *

Memorandum and Order

Whitman Knapp, District Judge.

Defendant Hilda Niedelman moves to dismiss an indictment charging her with one count of conspiracy, twenty-three "Travel Act" counts, and twenty-three mail fraud counts. She contends that:

1. The Travel Act 18 U.S.C. § 1952, does not cover the alleged offenses commercial bribery.

2. The mail fraud counts are defective in that they fail to identify a victim of the alleged scheme to defraud.

3. The grand jury did not act as a body independent of the United States Attorney in that it did not scrutinize the actual terms of the indictment.

4. There is a possibility that defendant Niedelman's testimony before the grand jury was not heard by every juror that voted to indict her.

5. The prosecutor abused his discretion by seeking to indict defendant Niedelman at all, by treating her so severely in comparison both to her co-defendants and to those charged in companion indictments, and by failing to seek an indictment against either Aviquipo, the corporation of which defendant was Treasurer, or Lockheed, which later acquired it.

I am persuaded that § 1952 was not intended to cover commercial bribery, but reject defendant's other arguments.

I.

Section 1952 provides:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity;

or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000

or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means

(1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in Section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or

(2) extortion, bibery, or arson in violation of the laws of the State in which committed or of the United States.

The instant prosecution is based on a combination of (a)(1) and (3) and (b)(2), the government's theory being that defendant Niedelman used the mails with intent to carry on "bribery" in violation of New York Penal Law § 180.00, McKinney's Consol.Laws, c. 40. That statute, entitled Commercial Bribing, provides:

> "A person is guilty of commercial bribing when he confers, or offers or agrees to confer any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs. Commercial bribing is a class B misdemeanor."

The offense charged in the indictment is that defendant Niedelman participated in a scheme whereby payments were mailed from Aviquipo, Inc. to the purchasing agent for Fiat, for the purpose of including such agent to place purchase orders for Fiat with Aviquipo.

Defendant contends that the alleged offense is not punishable by § 1952 because the Congress did not intend to cover the offense known in New York as "commercial" bribery when it used the generic term "bribery."

Similar contentions have heretofore been raised and rejected in this District. See United States v. Maiolo (72 Cr. 1123), United States v. Endresen (73 Cr. 85), United States v. Hohn (72 Cr. 1124), and United States v. Callahan (72 Cr. 1126). I feel constrained to disagree with these determinations.

The Supreme Court's decision in United States v. Nardello (1969) 393 U.S. 286, 89 S.Ct. 534, 21 L.Ed.2d 487 is here controlling. In that case, an indictment under the Travel Act charged the defendants with "shakedown" operations (luring victims into sexual situations of a compromising nature and then extorting money on threat of exposure) committed in Pennsylvania with the aid of instrumentalities of interstate commerce. The District Court dismissed the indictment on the ground that Pennsylvania statutes defined the defendants' unlawful conduct as "blackmail" rather than "extortion" and that the offense was therefore not picked up by the Travel Act. The Supreme Court reversed, ruling that the Travel Act, in providing for Federal punishment of such "extortion" as was prohibited by State law, was intended to reach conduct deemed by the Congress to be extortionate, regardless of the nonenclature employed by State legislatures in punishing the conduct in question. Turning, therefore, to the case at bar, the question is whether or not the Congress had in mind unauthorized payments to purchasing agents when it used the generic term "bribery" in the Travel Act.

As I read the *Nardello* decision, the court laid down some rather clear guidelines for resolving such a question. Interpretation of the Travel Act, *Nardello* declared, should have the effect of carrying forward two basic Congressional objectives: (1) to assist the states in fighting the depredations of the organized underworld (393 U.S. at 290-292, 89 S.Ct. 534); and (2) insofar as possible, to achieve an interpretation having a uniform effect throughout the nation (at 293-294, 89 S.Ct. 534). The interpretation urged by the government in the case at bar would further neither of these objectives, and would utterly thwart the second.

As to the first objective, the extensive Congressional hearings cited by the Court in *Nardello* and by respective counsel in the case at bar contain not so much as a hint that so-called "commercial" bribery (as opposed to conventional bribery, arson and extortion) was ever considered to be a typical tool of the underworld. On the contrary, as the case at bar—like the companion cases of *Maiolo, Endresen, Hohn* and *Callahan*—illustrates, commercial bribery is typically an establishment transgression. Furthermore (as the next paragraph establishes), at the time the Travel Act was under consideration, no legislature had ever treated "commercial" bribery as severely as the various crimes ultimately specified in that statute.[1]

As to the second objective, achieving national uniformity, we find that in 1960—the year before the Travel Act was enacted—one half the states imposed no criminal sanctions upon commercial bribery, twelve had limited statutes, and only thirteen had general states punishing such an offense. Among the states which punished the particulr conduct here involved (payments to a purchasing agent) potential prison terms varied from 6 months (Nebraska, Washington), to a year (Connecticut, Louisiana, Massachusetts, Michigan, New York, Pennsylania, Rhode Island, South Carolina, Virginia, Wisconsin). See Note, 108 U.Pa.L.Rev. 848 (1960), Chart pp. 864, 866. Since the Travel Act was enacted, New York has reduced the possibility of imprisonment to a maximum of three months [N.Y.Penal Law §§ 180.00, 70.15 (2)]. In other words, the interpretation of the Travel Act which the government here urges would in some states have the drastic effect of converting a minor state offense into a major federal felony, while in other states it would have no effect whatever. In neither event would it assist the states by making available federal punishment comparable

[1] One might well disagree with the legislative judgment that thus downgrades a crime characteristically committed by the establishment. However it has not been suggested that any such consideration was urged before the Congress when it was considering the Travel Act.

to that which they, in their legislative judgment, had already fixed for the offense involved. I need not—and for present purposes do not—question the Congress' power to create such a situation. However, I find absolutely no evidence that the Congress harbored any such intent. *Cf.* United States v. Bass (1972) 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488, United States v. Enmons (1973) 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379.

Counts 26 through 48 are accordingly dismissed. Since Count 1 charges only a conspiracy to violate the Travel Act, it too is dismissed.

• • • •

APPENDIX VII

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Memorandum

72 Cr. 1126 HRT

UNITED STATES OF AMERICA

—against—

FRANK CALLAHAN ET AL., *Defendants.*

TYLER, D. J.

This memorandum is directed to the various motions submitted by the defendants Frank Callahan, Jenks Metals Incorporated and Jenks Metals Exports, Incorporated, submitted on Friday, December 1, 1972.

MOTIONS TO DISMISS THE INDICTMENT

In counts 1 through 20 of the indictment, defendants are charged with violating 18 U.S.C. § 1952, by having traveled in and used the facilities of interstate and foreign commerce with intent to distribute the proceeds of "bribery" as that is defined and proscribed by §180 of the

New York Penal Law. Briefly stated, it is the position of the moving defendants that Congress did not intend to have § 1952 apply to commercial bribery as prohibited by the New York statute. This contention is without merit, since § 1952 on its face is clearly to the contrary. Thus, the motion to dismiss the first 20 counts of the indictment is denied. See *United States* v. *Nardello,* 393 U.S. 286 (1969); *United States* v. *Corallo,* 413 F.2d 1306, at 1323 (2d Cir. 1969).

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74–1260

LOUIS J. POMPONIO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 74–1374

CHARLES PILUSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. Apps. 1a–7a) is reported at 511 F. 2d 953. The oral order of the district court granting petitioner Pomponio's motion for arrest of judgment (Pomponio Pet. App. 9a–10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1975. The court of appeals denied rehearing on March 4, 1975. Petitioner Pomponio filed his petition for a writ of certiorari on April 3, 1975. On March 20, 1975, the Chief Justice extended petitioner Piluso's time for filing a petition for a writ of certiorari until May 3, 1975, and the petition was filed on May 2, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of 18 U.S.C. 215 and New York Penal Law § 180 (1975) are set forth at Pomponio Pet. 3–5.

QUESTIONS PRESENTED

1. Whether petitioners' indictment under 18 U.S.C. 1952 (the Travel Act) was invalidly based on violations of Section 180 of the New York Penal Law (concerning commercial bribery) and 18 U.S.C. 215 (concerning payments to bank officials for aid in securing loans).

2. Whether, as to petitioner Piluso, the trial court erroneously instructed the jury that it could rely on conduct violating either statute in finding "bribery" within the meaning of the Travel Act.

3. Whether petitioner Piluso was prejudiced by the trial court's inaccurate description of the conspiracy charged during an otherwise proper instruction.

STATEMENT

Petitioners were indicted in the Eastern District of Virginia for conspiracy and substantive offenses involving interstate travel to promote the unlawful activity of bribery, in violation of 18 U.S.C. 1952, and 371 (Pomponio Pet. App. 10a–15a; Piluso Pet. App. 10a–14a).[1] Prior to trial petitioners moved to dismiss the indictment, claiming that the unlawful bribery activities they were accused of traveling to promote—violations of 18 U.S.C. 215 and Section 180 of the New York Penal Law—did not constitute the "unlawful activity" of "bribery" under the Travel Act, 18 U.S.C. 1952 (Piluso Pet. App. 15a). The district court denied the motion.

After the court severed the case against petitioner Pomponio because of his health problems, the trial of petitioner Piluso and his co-defendants proceeded and a jury convicted petitioner Piluso on one count of conspiracy to violate, and two counts of violation, of the Travel Act. He was sentenced to concurrent terms of two years' imprisonment.

Petitioner Pomponio was convicted by a jury on the same charges. He moved for arrest of judgment pursuant to Rule 34, Fed. R. Crim. P., reiterating his challenge to the indictment on the ground that the Travel Act did not cover the unlawful activity charged. The district court granted the motion (Pom-

[1] Also indicted were Peter and Paul Pomponio, whom the jury acquitted.

ponio Pet. App. 9a–10a), and the government appealed.

The court of appeals, having consolidated the appeals, reversed and remanded in petitioner Pomponio's case and affirmed petitioner Piluso's conviction, holding that violations of Section 180 of the New York Penal Law and 18 U.S.C. 215 constitute the unlawful activity of bribery under the Travel Act (Pet. Apps. 1a–7a).

The evidence is not in dispute and may be briefly summarized. As part of his job as senior vice-president of the Royal National Bank in New York City, in charge of real estate construction and financing loans, Sidney Zneimer processed requests for periodic advances or draws against construction loans. Bank inspectors would verify that the progress in construction work was as represented in the individual's draw request so that the bank's loan would be secured by work in place. (Tr. 280–287.)

Petitioners were in the business of constructing high-rise buildings. In 1967, on their own initiative, they paid Zneimer for securing for them a loan to pay off a second mortgage owed to the Royal National Bank. Thereafter, one of the petitioners travelled to New York City and gave Zneimer a check each time he approved a construction loan for one of their corporations.

Over a five-year period, Zneimer helped petitioners receive eleven construction loans from Royal National Bank, totalling $16 million. This included over-advances of approximately $3 million, most of which were given without the approval of the bank's inspec-

tors. Petitioners paid Zneimer $320,000. (Tr. 282–283, 293, 373–374, 494–496.)

ARGUMENT

1. Petitioners contend that the indictment did not charge a violation of the Travel Act, because acts in violation of the state law (N.Y. Penal L. § 180 (1975)) and the federal law (18 U.S.C. 215) referred to in the indictment did not constitute the "unlawful activity" of bribery within the meaning of the Act.[2] The decision of the court of appeals rejecting these claims does not conflict with the decision of other courts of appeals[3] and properly construes the Travel Act.

The indictment charged in essence that petitioners conspired to and did travel between Virginia and New York with the intent to make payments to the officer of a national banking association to influence him in the performance of his duties without the consent of the bank, and that they thereafter made such payments, thereby engaging in the unlawful activity of bribery in violation of N.Y. Penal L. § 180

[2] Petitioner Piluso makes the same challenge to his conviction, but since he does not dispute the sufficiency of the evidence to support the allegations of the indictment, we address the issues in the context of the indictment.

[3] Petitioners assert (Pomponio Pet. 9–10; Piluso Pet. 16–22) a conflict with *United States* v. *Niedelman*, 356 F. Supp. 979, 980–982 (S.D. N.Y.), holding in conflict with other decisions in the same district, that a Travel Act charge cannot be based on N.Y. Penal L. § 180. But a conflict between decisions of a court of appeals and of a district court does not require resolution by this Court. The conflict among judges in the Southern District of New York is for the Second Circuit to resolve. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

and 18 U.S.C. 215. The New York law proscribes the misdemeanor of "commercial bribing," consisting of the conferring of a benefit on an employee to influence his conduct in relation to his employer's affairs, without the latter's consent. N.Y. Penal L. § 180. The federal law makes it a misdemeanor for an officer of any bank whose deposits are insured by the Federal Deposit Insurance Corporation to receive or agree to receive anything of value from any person for endeavoring to procure a loan from the bank. 18 U.S.C. 215.

a. Petitioners argue (Pomponio Pet. 16, 20; Piluso Pet. 14–19) that violations of neither the state law nor the federal law can be a basis for violation of the Travel Act, which is a felony, because they are both misdemeanors. The Travel Act makes it a crime to travel interstate to promote "any unlawful activity" (18 U.S.C. 1952(a)(3)), which is defined as including, *inter alia*, "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States." 18 U.S.C. 1952(b)(2).[4]

There is nothing in this language that limits it to unlawful activity that is a felony. On the contrary, it broadly prohibits certain offenses that are "in violation of the laws of" a state or the United States. Conduct that a state or the United States has made a misdemeanor is conduct "in violation of" its laws.

The courts of appeals have rejected petitioners'

[4] Under Section 1952(b)(1), "unlawful activity" also includes any business enterprise involving gambling, non-tax-paid liquor, narcotics or controlled substances, or prostitution offenses in violation of state or federal law, without regard to their status as felonies or misdemeanors.

narrower reading of the Travel Act and applied the statute to travel to promote crimes that are misdemeanors. See, *e.g., United States* v. *Brennan,* 394 F. 2d 151, 153 (C.A. 2); *United States* v. *Karigiannis,* 430 F. 2d 148, 150 (C.A. 7), certiorari denied, 400 U.S. 904. Indeed, the state law violations underlying the Travel Act violation this Court upheld in *Erlenbaugh* v. *United States,* 409 U.S. 239, included misdemeanors.[5]

The characterization of bribery and other "unlawful activities" referred to in the Travel Act may vary among the states at any given time,[6] and may not always remain what it was when the Act was enacted in 1961. There is no indication that Congress incor-

[5] For example, under Ind. Ann. Stat. § 10–2307 (1956) (see 409 U.S. at 242), the maximum penalty was a $100 fine and three months' imprisonment.

This Court's pre-*Erlenbaugh* decision in *Rewis* v. *United States,* 401 U.S. 808, is not to the contrary. In stating that Congress did not intend that "the geographic origin of [a gambler's] customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies" (*id.* at 812), the Court was addressing the role of the interstate travel, not the classification of the state offense. (In fact, violation of the state statute underlying the indictment in *Rewis* (Fla. Stat. Ann. § 849.09 (1975)) was punishable by imprisonment for from one to five years in the circumstances alleged in that case.) Indeed, the statement apparently recognized that, if the travel requisites of the Act were met, it would reach travel to promote "relatively minor state offenses."

[6] For example, bribery of public officers was a misdemeanor at common law (Clark & Marshall, *Crimes* § 14.02, at 1032 (7th ed. 1967)) and is not a felony in all states (*e.g.*, R. I. Gen. L. Ann. § 11–7–3 (1956)), and "commercial bribery" is a felony in some states, *E.g.*, Tex. Codes Ann. § 32.43 (1974); Colo. Rev. Stat. § 40–5–401 (1963).

porated *sub silentio* such an adventitious limitation into the Travel Act.

b. Petitioners contend that violation of neither N.Y. Penal L. § 180 nor 18 U.S.C. 215 constitutes "bribery" within the meaning of the Travel Act. With respect to the state law, petitioners contend (Pomponio Pet. 11–15; Piluso Pet. 19–22) that the Travel Act is implicitly limited to bribery of public officers, as at common law, and does not encompass "commercial bribery" of purely private employees. But while the primary impetus for this provision of the Travel Act may have been bribery of public officials (cf. *United States* v. *Nardello,* 393 U.S. 286, 292, n. 9), the Act is not limited to bribery of public officials nor to bribery as defined at common law.

As petitioners acknowledge (Pomponio Pet. 12, n. 7: Piluso Pet. 20), when the Travel Act was enacted the bribery statutes in many states were not confined to public officials and often covered commercial bribery. In view of Congress' purpose in the Travel Act of curtailing multi-state criminal enterprises, the legislature did not intend to ignore the broadened scope that the state bribery statutes had come to have. The essence of the offense of bribery is the unauthorized exchange of money for action the recipient is empowered to take (Clark & Marshall, *Crimes* § 14.02 (7th ed. 1967); 3 *Wharton's Criminal Law and Procedure* § 1386 (Anderson ed. 1957); the public or private character of the action is secondary.

c. Petitioners make a similarly technical challenge to the indictment's reference to 18 U.S.C. 215, claim-

ing that it proscribes "graft," not "bribery," and penalizes only the recipient, not the briber (Pomponio Pet. 17–19; Piluso Pet. 10–14). This Court made clear in *Nardello,* however, in holding that acts prohibited by a "blackmail" statute constituted "extortion" for the purpose of the Travel Act (393 U.S. at 293–295), that the applicability of the Act is governed by the essential nature of the underlying offense, not its particular title or characterization.

Like other bribery statutes, Section 215 is directed at, and seeks to prohibit, the unauthorized exchange of action for money. That it directly penalizes only the recipient instead of both parties (cf. 18 U.S.C. 201) makes it no less a "bribery" statute, particularly in view of the potential liability of the giver of the bribe as an aider and abetter. 18 U.S.C. 2.[7]

2. Petitioner Piluso contends (Pet. 23–25)[8] that if this Court were to hold that only either the New York law or Section 215 can be relied upon to establish the unlawful activity of bribery under the Travel Act, but

---

[7] Petitioners' reliance (Pomponio Pet. 17; Piluso Pet. 12) on *Razete* v. *United States*, 199 F. 2d 44 (C.A. 6), certiorari denied, 344 U.S. 904, is misplaced. There, in holding specific criminal intent unnecessary under 22 U.S.C. 1584 (prohibiting the giving of something to, or its acceptance by, a government employee in connection with procurement of goods or services), the court discussed in *dicta* certain general distinctions between "graft" and "bribery," but noted that the latter included "receiving * * * anything of value with the intent to influence the recipient's actions * * *." *Id.* at 48.

[8] Petitioner Pomponio, who has not yet been sentenced nor appealed his conviction, cannot and does not make this claim at this juncture.

not both, his conviction cannot stand because the jury may have based it upon travel to promote bribery in violation of the inapplicable statute. Cf. *Stromberg* v. *California*, 283 U.S. 359, 368; *Leary* v. *United States*, 395 U.S. 6, 31–32.

If the Court were to agree with our submission that the Travel Act covers the crimes prohibited in both statutes, there would be no occasion to consider this issue. In any event, Piluso did not object to the charge on this ground, did not attempt to require the government to elect one of the statutory references, and did not seek appropriate forms of special questions to the jury. Unlike *Stromberg* and *Leary*, the same evidence here showed schemes to promote violations of both statutes.[9]

3. Petitioner Piluso also contends (Pet. 25–27) that a single inaccuracy in the trial court's description of the scope of the conspiracy constituted reversible error.[10] However, in its instructions, covering 50 pages of trial transcript (Tr. 1201–1251), the district court accurately explained several times the nature and scope of the Travel Act charges and the conspiracy charge (Tr. 1206, 1207, 1228–1229, 1240). Viewing the charge as a whole (*Cupp* v. *Naughten*, 414 U.S.

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[9] In both *Stromberg* and *Leary* there was a strong possibility that the jury convicted on the basis of facts that did not establish an offense.

[10] At one point in the court's extensive charge, after having explained several times the scope of the substantive and conspiracy charges, the court erroneously stated "that the conspiracy is to violate these two federal laws, 1952 and 215" (Tr. 1208; Piluso Pet. App. 27a).

141, 146–147) and the unchallenged sufficiency of the evidence, the isolated, fleeting misstatement did not constitute reversible error. See *United States* v. *Gary*, 447 F. 2d 907–911 (C.A. 9).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitions for writs of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1260

LOUIS POMPONIO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY FOR PETITIONER

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IN THE

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---

REPLY FOR PETITIONER

The Brief for the United States in Opposition ("Opp.") is more a preliminary brief on the merits than a genuine attempt to respond to the Petition ("Pet.") or to deny that certiorari should be granted.

To the extent that it does not simply assert that the views it presents are the law, the Opposition exposes itself as an attempt to rewrite both history and the law.[1]

I.

THE GOVERNMENT'S OPPOSITION IS INCONSISTENT WITH THE POSITION TAKEN BY THE GOVERNMENT IN THE NARDELLO CASE.

The most revealing index to the quality of the Opposition is its attempt to conceal the irreconcilable inconsistency in the Government's own legal positions. What is now proffered in the Opposition is directly opposed to the reading of the Travel Act the Government presented to this Court in all the deliberateness and formality of a brief on the merits, in *United States* v. *Nardello,* 393 U.S. 286 (1969) (*"Nardello"*). What the Government represented to this Court in *Nardello* supports the Petition in this case; it cannot be harmonized with the Opposition.

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[1] In addition, the Opposition finds it necessary or desirable to rewrite the record. It asserts, for example, that the Indictment charged that the travel in this case was "with the intent to make payments to the officer of a national banking association to influence him in the performance of his duties *without the consent of the bank*" (Opp. 5; emphasis is added throughout this Reply unless otherwise specified); in plain truth, however, the Indictment simply does not include the charge of "without the consent of the bank". Whether the Indictment is defective for this reason is subsumed within the Questions Presented in the Petition. It would appear that the Government has now recognized that such an allegation was legally required (Opp. 6).

Similarly unfounded is the statement that Zneimer helped Petitioners receive construction loans from the Royal National Bank totalling $16 million (Opp. 4). In plain truth, the $16 million is the amount of loans from other sources for which Petitioner contended that the $320,000 was paid. This was the amount of the secondary, not primary, financing.

In *Nardello,* the Government position, which this Court accepted, was that the term "bribery" in the Travel Act was directed and limited to the corruption of public officers—as the Petition herein sets out. It was upon the restriction of "bribery" to conduct by public officials that the Government based its contention that "extortion" (the term at issue in *Nardello*) must be interpreted as extending to blackmail by private individuals; the contention was that "extortion" would be rendered superfluous if it were to be restricted to corruption in the public sector, precisely because the Travel Act proscribed "bribery," an unlawful activity restricted to corrupt conduct by *public* officials.[2] In *Nardello* the Government recognized and the Court determined that the proper accommodation between the terms "bribery" and "extortion" in the Travel Act required assigning each to a separate sphere so that neither term would be rendered superflous. This very construction of the Travel Act would be vitiated if the Government position in this case were ultimately to prevail.

The Government meticulously eschews any response to this point in the Opposition and blandly takes the contrary position. It has the temerity to base its position upon an assertion that "the Act is not limited to bribery of public officials nor to bribery as defined at common law" (Opp. 8). The Government has thus

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[2] This was fully discussed in the Petition, at pages 12-15; the Government's brief in *Nardello* is quoted at pages 12-13, n. 8 of the Petition, and the Court's references to the Government's position in *Nardello,* at pages 12-14, including the quotation from the decision setting out the Government's argument, 393 U.S. at 293, n. 11 (Pet. 12).

blinded itself to the blatant inconsistency of that assertion with its own prior representations to this Court.

II.

THE LEGISLATIVE HISTORY DEMONSTRATES THAT BRIBERY AS USED IN THE TRAVEL ACT IS RESTRICTED TO THE CORRUPTION OF PUBLIC OFFICIALS.

This Court's decision in *Nardello* relied upon the legislative history of the Travel Act, particularly the express declarations by both the Attorney General and the Deputy Attorney General that the Travel Act was directed to bribery of public officials (Pet. 13-14). The Government now asserts that this legislative history shows that "the *primary* impetus for this provision of the Travel Act may have been bribery of public officials" (Opp. 8). As demonstrated above, the Government's position in *Nardello* was that the entire reach of "bribery" as used in the Act was circumscribed by public official conduct. Either the Act was intended to be confined to the bribery of public officials, or it was not; either "bribery" in the Act does, or does not, reach private conduct. These questions demand an "either-or", "yes-or-no" answer.

In historical fact, the statute was directed to the corruption of public officials, not private individuals. The "bribery of public officials" was the impetus for this provision of the Travel Act (Pet. 14, n. 9). There was no legislative intention to extend the term beyond that parameter; the Opposition certainly does not even suggest there is any legislative history or other such support for its assertions.

III.

THE OPPOSITION DISREGARDS THE CLEAR, WELL-ESTABLISHED DISTINCTION BETWEEN BRIBERY AND COMMERCIAL BRIBERY.

Evidently because the legislative history so clearly demonstrates that the term "bribery" in the Act did not embrace 'commercial bribery," and that the terms and concepts "bribery" and "commercial bribery" are separate and distinct, the design reflected in the Opposition is simply to equate the two and thus to disregard or obfuscate the clear legal distinction between them.

a. The Opposition asserts, for example, that when the Travel Act was enacted the bribery statutes in many states were not confined to public officials and often covered commercial bribery (Opp. 8),[3] as though any particular provision in all of "the bribery statutes" equated "bribery" with "commercial bribery" without express provision therefor. The opposite is true, for it was universally recognized that the term and concept "bribery" was restricted to corruption of public officials, so that express references to private conduct or to commercial bribery were required for legislative action to be deemed to extend to such conduct.

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[3] Fulfillment of the Opposition's design of equating the two evidently demanded an egregious misrepresentation of the Petition—that "petitioners acknowledge" this assertion (Opp. 8). In plain truth, the Petition referred to the number of states with "*commercial* bribery" statutes in the context of the traditional and accepted distinction between "commercial bribery" and "bribery", the former extending to private individuals, but the latter limited strictly to conduct involving public officials.

Two state "bribery" statutes expressly include reference to "private" persons.[4] The other statutes which had established the crime of "commercial bribery" had added a separate and distinct statutory provision, segregated from the "bribery" section, like Section 180 of the New York Penal Law involved in this case (which was enacted subsequent to the adoption of the Travel Act). Manifestly, the Government is seeking to rewrite history in blandly asserting that state criminal laws at the time of the adoption of the Travel Act equated "bribery" and "commercial bribery."

b. The same attempt to present as one legal concept what has always been analyzed as two separate concepts is reflected in the Government's employment of treatise authority. The Government's assertion that this authority regards "bribery" as including any "unauthorized exchange of money for action" without regard to whether the action is of a "public or private character" (Opp. 8) does not withstand analysis. The Government would have the Court believe, for example, that Clark & Marshall, *Crimes,* § 14.02 at 1032 (7th ed. 1967), draws a distinction between "bribery of public officers" and "bribery." *Compare* Opp. 7, n. 6 *with* Opp. 8. In plain fact, that authority declares: "At common law, and under other relevant statutes, bribery may be defined as the giving of anything of value to any *person holding a public office,* or to any person performing a *public duty*, or the acceptance thereof by any

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[4] Sections 97-11-11 and 97-11-13 of the Mississippi Criminal Code covered, respectively, the giving and the receiving, involving "any officer, agent, or trustee, *either public or private,* while holding such office, agency or trust, or after he has become a candidate or applicant for the same * * *." Rhode Island General Laws Annotated §§ 11-7-3, 11-7-4 established as a misdemeanor the bribery of agents, employees or servants "*in public or private employ* * * *."

such person, with the intention that he shall be influenced thereby in the discharge of his legal duty" (Clark & Marshall, *Crimes,* 1032 (7th ed. 1967)). *Commercial bribery* is treated as a separate and distinct offense (*id.* at 1037-1038; emphasis in original).

Identically, 3 *Wharton's Criminal Law and Procedure* § 1386 (Anderson ed. 1957) (Opp. 8), in an exposition of the law which does not appear in the Opposition, declares, "Anything may serve as a bribe so long as it is of sufficient value in the eyes of the person bribed to influence his *official* conduct." The initial sentence in the overall discussion of "Bribery", which commences with § 1380 at page 771 and likewise goes unrecognized in the Opposition, reads: "Bribery is the offense of giving or receiving money or anything of value in return for which a *public officer* agrees to do or to refrain from doing an act, contrary to his legal duty." This general introduction in *Wharton's* includes this caveat: "The definition is sometimes stated so broadly as to include the violation of any 'legal duty,' as contrasted with a public or official duty. This, however, would seem to extend the definition too far, for ordinary civil duties should not be brought within the ambit of criminal prosecution" (*id.* at 773; footnote omitted).

c. In representing that *Razette* v. *United States,* 199 F.2d 44 (6th Cir.), *cert. denied,* 344 U.S. 904 (1952) holds that bribery is not restricted to official actions but includes the receiving of "anything of value with the intent to influence the recipient's actions" (Opp. 9, n. 7), the Government slips to the ploy of simply omitting from the quotation the language which truly conveys the Court's holding. What the Court held was that bribery included receiving "anything of value with the intent to influence the recipient's action *as a public*

official." Compare the Court's statement, 199 F.2d at 48 *with* the Government's, Opp. 9, n. 7. The Government's truncated reading of *Razette* is not confined to this revealing misquotation but extends to its analysis of the entire case and particularly its attempt to derogate as dictum the holding that there is a distinction between "graft" and "bribery" statutes. The very issue upon which *Razette* turned was whether the criminal statute involved, 22 U.S.C. § 1584, should be classified as a "graft" or a "bribery" statute. Manifestly, therefore, the Court's holding, as set out below, was indeed a holding and not dictum.

> "In bribery the specific intent to influence *official* action is required by the statute and must be alleged and proved. * * *
>
> "Graft means an advantage which one person by reason of his peculiar position of superiority, influence or trust exacts from another. It also includes the fraudulent obtaining of public money by the corruption of public officials. * * *
>
> "Bribery, a common law crime, is the offering, giving, receiving or soliciting anything of value with the intent to influence the recipient's action *as a public official.* It falls within a much narrower classification than that of graft." 199 F.2d at 48 (headnote indications and citations omitted).

* * * * *

In any view other than the Government's effort to maintain its untenable position in this case, there is a clear legal distinction between "bribery" and "commercial bribery." Whether United States District Judges in trials under the Travel Act may equate the two, as some have done at the same time that others have felt precluded, presents an issue which this Court should consider and decide.

IV.

THE TRAVEL ACT CANNOT BE USED TO MAKE 18 U.S.C. § 215 EXTEND TO THE CONDUCT OF THE PAYOR

Likewise, whether the Government may use the Travel Act to expand the scope of 18 U.S.C. § 215 to the payment as well as to the receipt of the specified inducement is an issue worthy of this Court's attention. The Petition analyzed the language of that statutory provision, as well as its context and purpose, in demonstrating that the decision below was evidently in error (Pet. 16-21). The Opposition assays no genuine answer to this demonstration, electing rather to engage in *ipse dixit* assertion of its own conclusion, without analysis or authority (Opp. 8-9). Patently, however, for Government prosecutors unilaterally, without any action by Congress, to apply a statute which in terms reads only against one who "receives or consents or agrees to receive" as though it reads "receives *or pays* or consents or agrees to receive *or pay*" raises an issue which merits review by this Court.

CONCLUSION

For the reasons stated herein and in the Petition, a Writ of Certiorari should issue to review the Judgment and Opinion of the Fourth Circuit.

Respectfully submitted,

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